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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

REPLY COMMENTS

Consumer Federation of America ("CFA") respectfully submits these reply comments in response to various comments filed pursuant to the Report and Order and Further Notice of Proposed Rulemaking, FCC No. 93-332 (released July 23, 1993) ("Further Notice") in the above matter.

CFA's principal concern is that the Commission implement the 1992 Cable Act in a manner which insures that there can be a vibrant marketplace of ideas. Congress has directed that there be competition in the delivery of video services to attain that goal.

The cable industry's posture is exemplified in the comments of Tele-Communications, Inc. ("TCI"), which states that "[a]t the very point when the cable industry is poised to contribute substantially to this country's principal telecommunications goal, the Commission is forced to place limitations on the industry's growth." TCI Comments at 4 (emphasis supplied). This misstates the mandate of the Commission. The Cable Act does not limit the industry's growth; the cable industry is growing, and will continue to grow under these regulations. See Motion Picture Associa-

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tion of America ("MPAA") Comments at nn. 6-7 and accompanying text.

The Congressional concern is that, absent regulation, one or a few cable operators will acquire and retain a huge percentage of the market and monopolize the free flow of information and ideas. In seeking to remedy this anti-competitive pattern, Congress was fulfilling the First Amendment goal of achieving viewpoint diversity.

I. SUBSCRIBER LIMITS SHOULD BE HELD TO LEVELS THAT PROMOTE CONGRESS' INTENT TO PROMOTE PROGRAMMING DIVERSITY.

CFA supports establishing subscriber limitations at the lower end of the range proposed by the Commission: 20%-25%.

In Section 2(a)(4) of the 1992 Cable Act, Congress found that "[t]he cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers." Moreover, the stated policy of the Act is to "promote the availability to the public of a diversity of views and information," and to "ensure that cable operators do not have undue market power vis-a-vis video programmers and consumers." 1992 Cable Act, §2(b). Allowing a greater, rather than a lesser, level of horizontal ownership would not adequately address the concerns or the policies of Congress. Thus, CFA recommends a 20% subscriber limit.

CFA fully recognizes that Congress wished to rely on the marketplace to the maximum extent feasible, and to insure that cable operators could continue to reach new audiences. *See* 1992

Cable Act Section 2(b). Congress was concerned that excessive regulation could impede the development of the industry and the availability of technology to the detriment of the public. However, as MPAA states, "[g]reater concentration is clearly not a precondition for cable operator investment in new programming services or deployment of advanced cable technologies." MPAA Comments at 3 (noting that MSOs with very small market percentage share continue to invest heavily in technology).[1]

A. THE COMMISSION'S CONCERN OVER DIVESTITURE IS MISPLACED. THEREFORE, A LIMIT ON THE LOW END OF THE RANGE IS JUSTIFIED.

CFA believes that the Commission has ample authority under the Cable Act to promulgate rules that might result in divestiture. The Commission points to one phrase in the Senate Report for the proposition that the legislative history "suggests" that current ownership levels be maintained. Further Notice at ¶147.

This lone reference hardly establishes that Congress would

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[1]Several commenters place great emphasis on the fact that other industries exist at greater concentration levels. See Liberty Media Comments; TCI Comments. They argue that the courts have recognized that monopolistic power cannot be used above a certain level. This argument, however, does not translate well in the present context. The other industries that are mentioned by TCI all lack a fundamental characteristic present in this industry: the First Amendment. The marketplace for ideas is simply not the same as the marketplace for goods and services. While it may be fine that America gets most of its chewing gum from Wrigley, it is another thing entirely to allow Wrigley to control such a large flow of information to America.

The point is not that an MSO with 40% channel occupancy cannot monopolize the industry. The point is that an MSO with 40% channel occupancy could effectively monopolize what people see. This danger is heightened by the fact that the MSOs decide which programmers are carried. Thus, they could keep the best positions and programs for themselves and shut out the others.

never countenance divestiture. In fact, in quoting the Senate Report to the effect that "the legislation does not imply any company must be divested...," Further Notice at n. 137, the Commission omits the second half of the sentence. That passage clearly states that the legislation "gives the FCC flexibility to determine what limits are reasonable in the public interest." Senate Report at 34. This flexibility is surely broad enough to comprehend occassional divestiture if necessary to protect the public interest. Nothing else in the plain language, legislative history, or the structure of the Act is to the contrary.

B. A MINORITY EXEMPTION SHOULD NOT BE GRANTED WITHOUT CONSIDERATION OF OTHER FACTORS.

CFA applauds the Commission's resolve to address minority ownership issues in the Further Notice. However, the minority exemption as proposed is not, by itself, sufficient to insure program and viewpoint diversity. As drafted, the proposal does nothing to insure that diverse views are presented, and leaves broad latitude for MSOs to retain effective control. MSOs can still influence decisions even if they are not in full control for the same reasons discussed below in the context of attribution standards. The result is that the diversity sought is diluted by MSO influence. Therefore, the proposal should be revised to address minority ownership and diversity more effectively.

C. ATTRIBUTION STANDARDS SHOULD REFLECT THE REALITY THAT INFLUENCE IS JUST AS HARMFUL AS CONTROL.

CFA advocates the strictest possible attribution standards in both the horizontal and vertical ownership rules. It supports the

Commission's proposal to the extent that it focuses on the ability to influence a cable system rather than just viewing ownership from a technical standpoint. In this context, the influence of an MSO is enlarged by the fact that it controls channel selection.

For these reasons, the Commission should adopt an attribution level of 1%. At the very most, the Commission should use the 5% level used for broadcasting. Furthermore, the Commission should not adopt exceptions to attribution based on majority ownership, limited partnership, or nonvoting/debt interests because they represent a step back to the notion that control is the key and "mere" influence does not matter.

II. CONGRESS MANDATED THAT THE COMMISSION SHOULD SET CHANNEL OCCUPANCY LIMITS TO ENCOURAGE DIVERSITY AND FAIRNESS TO PROGRAMMERS. A FORTY PERCENT CHANNEL OCCUPANCY IS SIMPLY TOO HIGH TO EFFECTUATE THIS GOAL.

The Commission attempts to balance the supposed benefits of vertical integration with the importance of having a diversity of voices over the wire. In so doing, it relies on the fact that the 1992 Cable Act promotes viewpoint diversity via must-carry and PEG channel carriage requirements. But must-carry and PEG obligations were hardly regarded as sufficient standing alone to insure diversity. The clearly stated policy of the Act is much broader: to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." 1992 Cable Act, §2(b)(5). As MPAA points out, other programmers could easily find themselves shut out of systems or vying for a very limited number of spots. MPAA Comments at 8, Attachment A (demonstrating that if the level is set at 40% of the whole, no independent stations would remain on a thirty-six station system and only five would remain on a fifty-four station system). It is just such a scenario with which Congress was concerned.

It is only logical that the greater an MSO's share of cable capacity, the greater the MSO's potential voice and its leverage over other programmers. The fact that from one third to one half of the channels are already taken up by must-carry and PEG stations reinforces this position. Essentially, a 40% share of the entire capacity gives an MSO a 61%-80% share of the remaining universe. A better level would be 20-25% of the whole, which would allow an MSO a 40% share after the must-carry and PEG stations are subtracted.

Moreover, allowing a channel capacity of 40% of all channels would give MSOs precisely what Congress wished them not to have: "undue market power vis-a-vis video programmers." See, 1992 Cable Act, Section 2(b)(5). The limited channel capacity that would be left under the Commission's plan would erect a tall barrier to entry. Potential entrants into the programming market would face a terrible dilemma - they could either align themselves with the MSO, or they could vie for the extremely meager number of spots left. The former option means that these programmers would be forced to give up some of their independence. The latter means that the MSO will profit from their high channel capacity as others bid up the price of the remaining channels to be carried by the MSO. This is not a dilemma that the MSOs face as programmers

Therefore, the percent share of channel occupancy should be lowered to 25%. In the alternative, the proposed 40% share should apply to the channels available after the must carry and PEG stations are subtracted.[2]

A. THE COMMISSION SHOULD RETHINK THE DEFINITION OF "QUALIFIED MINORITY PROGRAMMING SOURCE."

The Commission should allow a minority exemption for channel occupancy only if it provides meaningful guidance and scrutiny of the programming. "Qualified minority source" as defined in 47 U.S.C. §532(i)(2) is not meaningful guidance. The fact that a programmer targets minority groups is not the only criterion the Commission should use. It does not take much imagination to see that a channel that targets minorities and a channel that serves the needs, and presents the views, of minorities are two different things. At a minimum, the Commission should require those who seek to take advantage of the exemption to make an annual written demonstration of how their programming is targeted to minorities, and that such benefits should be revoked when no longer justified.

[2]CFA believes that the Commission should not grandfather the vertical ownership rules for the same reason. Such an action would only perpetuate MSO control.

CONCLUSION

CFA urges the Commission to promulgate regulations that comport more fully with Congressional intent. Once the Commission takes a step back and looks at the overall purposes of the Act, CFA trusts that the Commission will follow the recommendations set out above to insure that true competition can develop.

Respectfully submitted,

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